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No. 99-1218

Supreme Court, U.S.
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In The

Supreme Court of the United States

GANGI BROS. PACKING COMPANY, 7-UP BOTTLING COMPANY OF PHILADELPHIA, INC., 7-UP BOTTLING COMPANY OF SAN FRANCISCO, SOUTHEASTERN SPECIALTY FOODS CORP., TRANS-PACKERS SERVICES CORP., AND VARNI BROTHERS CORPORATION, DBA SEVEN-UP BOTTLING OF MODESTO, on behalf of themselves and all others similarly situated,

Petitioners,

v.

CARGILL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATE OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS GANGI BROS. PACKING COMPANY, ET AL.

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QUESTION PRESENTED

The Court may wish to consider this alternate formulation of the question presented by petitioner:

> 1. Whether antitrust plaintiffs in horizontal price-fixing cases are to be denied the protection of the general rule that evidence must be construed in the light most favorable to the nonmoving party in a summary judgment proceeding when defendants assert that their actions are innocent or inconsistent with the existence of a conspiracy?

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INTEREST OF AMICUS

Price-fixing conspiracies are famously difficult to discover and prove. Because of the practical difficulty of cracking these conspiracies, antitrust law has developed an extensive jurisprudence concerning the evidence, particularly circumstantial evidence, that will support a finding that a "combination" exists within the meaning of the Sherman Act.

Here, however, the lower court selectively invoked this Court's decision in *Matsushita* to allow defendants to prevail at summary judgment in a price-fixing case by making a facial showing that their actions could be consistent with legal as well as illegal activity. Fundamentally, the lower court erred by failing to resolve disputed, reasonable inferences to be drawn from circumstantial evidence in favor of plaintiffs before deciding summary judgment.

This is directly contrary to the general rule that defendant meets its burden under Rule 56 only when it "conclusively show[s] that the facts upon which [the plaintiff] relied to support his allegation were not susceptible of the interpretation which he sought to give them." *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-289 (1968). It is also contrary to this Court's view that the decisional calculus in antitrust summary judgment proceedings must be grounded on a policy "that illegal conspiracies be identified and punished", *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). It is also in conflict with this Court's conclusion in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 468 (1992), that it is a fallacy that "if the

moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment." Finally, the lower court's decision is in conflict with considered decisions of the Third and Seventh Circuits. *Petruzzi's IGA Supermarkets, Inc. v. Darling Delaware* Co., 998 F.2d 1224 (3d Cir. 1993); *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 778-79 (7th Cir. 1999); *In re Brand Name Prescription Drugs Litig.*, 123 F.3d 599 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998).

The State of California has a strong interest in clarifying the rules of inference to be applied to summary judgment proceedings in price-fixing cases. As a practical matter, if allowed to stand, the lower court's decision will make price-fixing conspiracies in the Ninth Circuit more difficult to root out by private plaintiffs and public agencies. This will allow some number of price-fixers to evade accountability for their unlawful conduct. This in turn will impose unnecessary and unlawful costs on California's consumers and industries.

SUMMARY OF ARGUMENT

The lower court's decision is in conflict with important decisions of this Court as well as thoughtful decisions of the Third and Seventh Circuits. These conflicts go to the heart of the methodology for proving the existence of a "contract, combination . . . or conspiracy", the essential first step in establishing a violation of section 1 of the Sherman Act. 15 U.S.C. § 1. These conflicts create fundamental problems in the administration of the

nation's most important antitrust law, the Sherman Act. Moreover, the decisional calculus reflected in the lower court's decision will have the practical effect of making it more difficult for public agencies as well as private plaintiffs to root out price-fixing. This will have a dramatic, negative effect on consumers and businesses throughout the nation. For these reasons, amicus curiae State of California respectfully requests that the petition be granted.

ARGUMENT

I. The Decision of the Lower Court Directly Conflicts with the Decisions of this Court in *Matsushita* and *Kodak*.

In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court addressed the standards of proof and persuasion applicable to a summary judgment motion in a predatory pricing case in which the alleged antitrust violation involved potentially beneficial price-cutting and a facially improbable economic theory. The Court made plain that is was not announcing a special rule for all antitrust cases. Rather, the decision announced a flexible rule that allowed trial courts to take into account the plausibility of the underlying violation and the danger such violations might pose to the public. *Id.* at 594-95.

This view was underscored by the Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). There, in a case in which the potential violation was not improbable or self-correcting, this Court concluded that "when we weigh the risk of deterring

procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment." *Id.* at 479. Indeed, the Court concluded that:

> The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. *Id.* at 468 (emphasis in the original).

This Court then cited with approval *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-289 (1968), which stated the ordinary rule that defendant meets its burden under Rule 56 only when it "conclusively show[s] that the facts upon which [the plaintiff] relied to support his allegation were not susceptible of the interpretation which he sought to give them." *Id.* at 468, n. 14. As Judge Posner of the Seventh Circuit observed in a case similar to this one:

> . . . the issue before us is not whether [defendants] were in fact participants in the price-fixing conspiracy; it is whether there is sufficient evidence of this to create a triable issue. In deciding this question we must construe the evidence as favorably to the plaintiffs as the

> record permits, not as favorably to the defendants as it permits. The defendants' interpretations may be correct; they are not inevitable. *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 614 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998).

The lower courts appeared to ignore these decisions. The trial court started with the premise that *Matsushita* created a "special rule" imposing an additional burden on plaintiffs at summary judgment in antitrust cases. *In re Citric Acid Litigation*, 996 F.Supp. 951, 954 (N.D. Cal. 1998). The circuit court repeatedly dismissed plaintiffs' evidence of conspiracy if there was any alternate, innocent explanation for the behavior. For example, disclosure of detailed sales figures to a European trade association populated by admitted members of the citric acid price-fixing cartel who used sales data to police the cartel was dismissed because defendant's participation might allow it to "get a better picture of world supply and demand conditions." *In re Citric Acid Litigation*, 191 F.3d 1090, 1100 (9th Cir. 1999). Meetings and conversations between defendant's executives and known members of the cartel were insufficient to allow plaintiffs to go to a jury because plaintiffs cannot prove that prices were fixed at these meetings. *Id.* at 1103. "[S]poradic price discussions" between an executive in defendant's company and executives in other companies, admittedly part of the conspiracy, could not go to a jury because they were not "probative" of the "conspiracy alleged". *Id.* at 1105.

As Judge Posner observed in *Prescription Drugs*, the fact that there may be an innocent explanation for the behavior of a defendant in a price-fixing case does not

mean that plaintiff does not get the chance to prove its case to a jury. The issue, therefore, is not whether there is a potential innocent explanation, but whether plaintiff's view of such evidence is unreasonable. In a case involving horizontal price-fixing and a not improbable violation of law, the lower court's casual dismissal of plaintiffs' circumstantial evidence of price-fixing conflicts with both *Matsushita* and *Kodak*.

II. The Third and Seventh Circuits Are in Substantial Conflict with at least the Fourth, Eighth and Ninth Circuits Over the Summary Judgment Standard to be Applied in Antitrust Cases.

The circuit courts have splintered on the meaning of this Court's decisions in *Matsushita* and *Kodak*. In *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1232 (3d Cir. 1993), the Third Circuit concluded that the reasonableness of plaintiffs' inferences was at the heart of *Matsushita*, and that "the acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the dangers associated with such inferences." Taking into account the fact that the case before it involved horizontal price-fixing, the *Petruzzi* court determined that the alleged conspiracy "would enable [putative conspirators] to make profits that the free market would not allow them, in both the short-run and long-run." *Id.*

In *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 778-79 (7th Cir. 1999), Judge Posner opined for the Seventh Circuit that *Matsushita* had to be understood as a case involving an antitrust claim that made "no economic

sense". As a consequence, in a garden-variety price-fixing case, plaintiffs should be given normal leeway to infer the existence of a conspiracy even if defendants offered an "innocent explanation" of their behavior. *Id.*

Similarly, in *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998), Judge Posner reversed a grant of summary judgment when plaintiffs' inferences of the existence of a price-fixing conspiracy were reasonable. He concluded that it is was not enough that "defendants' interpretations may be correct". *Id.* at 614. Fundamentally, he found that in determining whether there is a "triable issue", a court "must construe the evidence as favorably to the plaintiffs as the evidence permits, not as favorably to the defendants as it permits".

The Sixth Circuit appears to have taken a similar approach in *Ezzo's Invs. v. Royal Beauty Supply*, 94 F.3d 1032 (6th Cir. 1996). In that case, the court determined that evidence that did "not preclude an inference that [defendants] agreed" was sufficient to take the case to the jury. However, a more recent case appears to align this circuit with the Fourth and Eighth Circuits. *Super Sulky, Inc. v. United States Trotting Ass'n*, 174 F.3d 733 (6th Cir.), *cert. denied*, 145 L.Ed. 2d 146 (1999).

The Fourth Circuit takes the view that at summary judgment, a plaintiff must apparently conclusively prove that there was no innocent explanation for defendants' allegedly anticompetitive conduct. *Thompson Everett, Inc v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995). And the Eighth Circuit grants a presumption in favor of defendants by requiring lower courts to "not

lightly disregard" business justifications of putative price-fixers. *Corner Pocket of Sioux Falls v. Video Lottery Techs., Inc.*, 123 F.3d 1107, 1109 (8th Cir. 1997), *cert. denied*, 522 U.S. 1117 (1998).

Taken together, the federal circuits are in substantial disarray over the standard to be applied to summary judgment decisions involving antitrust claims, particularly claims like the one at issue here of horizontal price-fixing.

III. Resolution of These Mature Conflicts is Essential to Effective Public and Private Enforcement of the Sherman Act.

Finding the existence of a "contract, combination . . . or conspiracy" is a threshold requirement of price-fixing and other "hard core" violations of section 1 of the Sherman Act. To have the federal circuits in such disarray on the ways and means by which this critical element of antitrust law is proven or disproven in summary judgment proceedings goes to the heart of consistency in the federal system. These conflicts are mature in the sense that the circuits have considered, though conflicting, positions on the meaning of this Court's decisions in *Matsushita* and *Kodak*.

As a practical matter, the lower court's decision will have a chilling effect on public and private enforcement of the antitrust laws. Circumstantial evidence is critical to proving up the existence of most price-fixing conspiracies. Indeed, "it is axiomatic that the typical conspiracy is 'rarely evidenced by explicit agreements' but must almost always be proved by 'inferences that may be

drawn from the behavior of the alleged conspirators' ". *ES Dev., Inc. v. RWM Enters.*, 939 F.2d 547, 553-54 (8th Cir. 1991). Because such inferences are so crucial, the lower court's decision to grant summary judgment to defendants if they come up with a potentially non-conspiratorial explanation of their conduct will hamstring antitrust enforcement.

For this reason, amicus curiae State of California favors the formulation articulated by Judge Posner in *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998). This appears to reconcile the conflicting demands of traditional Rule 56 standards and the policy interests of courts and defendants in rooting out odd or illogical antitrust claims early in the judicial process. It also provides a reasonable calculus which will allow public agencies to pursue harmful price-fixing conspiracies in civil actions under the Sherman Act.

Notwithstanding our support for this standard, resolution of the current circuit conflicts strongly militates in favor of granting certiorari in this case. Specifically, the range of circumstantial evidence proffered by plaintiffs gives this Court an opportunity to write dispositively on the treatment of various forms of classic circumstantial evidence of conspiracy.

CONCLUSION

For the foregoing reasons, the Petition For a Writ of Certiorari sought by Gangi Bros. Packing Co., et al. should be granted.

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